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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABNER DIGHERO,

Defendant and Appellant.

A098125

(San Francisco County
Super. Ct. No. 181241)

Appellant challenges the imposition of drug testing and counseling conditions of probation following entry of his negotiated plea of guilty to grand theft (Pen. Code, § 487). We conclude that the conditions did not impose punishment in excess of the plea bargain, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

On January 28, 2002, appellant entered a negotiated plea of guilty to one count of grand theft in exchange for dismissal of a charge of robbery (Pen. Code, § 212.5, subd. (c)).² According to the terms of the plea agreement as articulated by defense counsel, the prosecution promised to recommend a term of three years' supervised probation, with credit for time served, imposition of standard search conditions, and payment of a fine and probation costs by appellant. The prosecutor added a request for appellant to be ordered to "stay away from" the victim. Upon advisement of his rights and the consequences of the plea, appellant accepted the expressed terms of the agreement.

¹ As this appeal has been taken following appellant's entry of a guilty plea, and the only issue is the propriety of the drug testing and counseling term of probation, we need not recite the facts pertinent to the underlying offense.

² All further statutory references are to the Penal Code unless otherwise indicated.

At the sentencing hearing on March 5, 2002, defense counsel objected to a recommendation in the probation report for the addition of probation conditions that appellant “submit to drug testing and counseling,” and avoid “gang associations.” Counsel asserted that the proposed conditions were “not agreed to in sentencing.” The court found that a gang condition “wasn’t part of the plea agreement,” and nothing in the record indicated that appellant was “a gang member.” Evidence of a “substance abuse problem” was revealed in the probation report, however, that the court felt “should be addressed” during felony probation. The court offered appellant the opportunity to “set aside the plea” if he did not want drug testing and counseling conditions “included” among the probation terms. No request to withdraw the plea was made by appellant. The court then announced that as an additional condition of probation appellant was “to engage in drug testing and counseling as deemed appropriate” by the probation department. Appellant was asked if he understood and agreed with the terms and conditions of his probation, and stated that he did.

DISCUSSION

The sole argument presented in this appeal is that the trial court “breached the plea agreement” by imposing “drug testing and counseling as ‘additional terms and conditions’ of probation even though they were not contemplated in the plea agreement.” Appellant requests that as a remedy in the nature of “specific performance,” we “should simply strike” the drug testing and counseling conditions.

In support of his objection to the addition of drug testing and counseling conditions to the terms of his probation, appellant relies on the established principle that, “Under section 1192.5, if a plea agreement is accepted by the prosecution and approved by the court, the defendant ‘cannot be sentenced on the plea to a punishment more severe than that specified in the plea’ ” (*People v. Masloski* (2001) 25 Cal.4th 1212, 1217.) “ ‘When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.’ [Citation.] It is well settled that a disposition harsher

than that agreed to by the court or the prosecution may not be imposed on a defendant.” (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 639.) A trial court may not accept a proffered plea bargain, then attach a new provision or condition to the final bargain without the defendant’s consent. (*People v. Jensen* (1992) 4 Cal.App.4th 978, 981; *People v. Morris* (1979) 97 Cal.App.3d 358, 363.) “Failure of the state to honor the agreement violates the defendant’s due process rights for which the defendant is entitled to some remedy.” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 636; see also *People v. Campbell* (1994) 21 Cal.App.4th 825, 829.) A defendant has the “established right to withdraw his or her guilty plea if the plea bargain is not honored” (*People v. Casillas* (1997) 60 Cal.App.4th 445, 450.)

Here, however, appellant was expressly offered the opportunity to withdraw his plea rather than consent to drug testing and counseling conditions of probation. Although he objected to the proposed drug testing and counseling conditions mentioned in the probation report, he not only declined to move to set aside the plea, but explicitly accepted the terms of probation imposed by the trial court. “If a defendant, who has been admonished concerning the right to withdraw the plea, does not object to punishment in excess of the bargain, the defendant relinquishes the right to withdraw the plea.

[Citation.] If a defendant has not been properly admonished, a failure to object to increased punishment does not waive the defendant’s right to the benefit of the bargain.” (*In re Jermaine B.*, *supra*, 69 Cal.App.4th 634, 640; see also *People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025; *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879; *People v. Clark* (1992) 7 Cal.App.4th 1041, 1048-1049.) “ ‘Of course, there can be no waiver of a constitutional right absent “an intentional relinquishment or abandonment of a known right or privilege.” [Citation.] No less should a court presume from mere silence that defendant is waiving implementation of the consideration that induced him to waive his constitutional rights.’ [Citation.]” (*People v. Walker*, *supra*, at p. 1025.)

Upon review of the record we find that after admonishment of the right to withdraw his plea, appellant intentionally and voluntarily consented to the imposition of

drug testing and counseling as conditions of his probation. Therefore, he has waived any objection on appeal that he received punishment in excess of the plea bargain.

Further, the plea agreement executed by the parties in the present case cannot be construed to divest the court of discretion to impose appropriate standard conditions of probation. (See *People v. Tang* (1997) 54 Cal.App.4th 669, 682.) Courts interpret the terms of a plea agreement under fundamental contract principles. (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 911; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217; *People v. Haney* (1989) 207 Cal.App.3d 1034, 1037; *Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 283; *People v. Alvarez* (1982) 127 Cal.App.3d 629, 633.) “[T]he scope of the waiver is approached like a question of contract interpretation—to what did the parties expressly or by reasonable implication agree?” (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.) “ ‘The court should accord an interpretation which is reasonable (Civ. Code § 1643) and which gives effect to the intent of the parties as it may be interpreted from their entire agreement’ ” (*People v. Haney, supra*, at p. 1039, citation omitted.) Using the paradigm of contract law, “courts should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties’ reasonable expectations.” (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. omitted.)

The trial court has broad discretion to routinely impose standard conditions of probation where the conditions imposed bear a reasonable relationship to the crime or the rehabilitation of the offender, and the plea bargain in the case before us did not limit the potential probation conditions available to the court. (*People v. Torres* (1997) 52 Cal.App.4th 771, 776.) While only probation search conditions were specifically articulated in the description of the parties’ agreement by defense counsel, neither the prosecution nor the defense mentioned that imposition of conditions related to drug possession, counseling or testing were prohibited. Nothing in the record suggests to us that drug conditions were even part of the parties’ negotiations that culminated in the plea. “[T]he imposition of an additional sentence term does not constitute a violation of a plea agreement if the term was not encompassed by the parties’ plea negotiations.

[Citations.] Moreover, ‘the variance must be “significant” in the context of the plea bargain as a whole to violate the defendant’s rights. A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations.’ [Citation.]” (*People v. Lopez, supra*, 66 Cal.App.4th 615, 636.) Appellant was not guaranteed or assured by either the trial court or the prosecutor that upon entry of his plea he would be granted probation free from drug testing or counseling. (See *People v. Chaklader* (1994) 24 Cal.App.4th 407, 413; *People v. Abdullah* (1992) 6 Cal.App.4th 1728, 1737.) Absent evidence that omission of drug conditions was part of the consideration for the plea, appellant cannot complain that the agreement was violated by the court’s sentence. (*People v. Lopez, supra*, at p. 636.) Appellant received just what he bargained for and could reasonably expect from the agreement: probation with appropriate conditions determined by the trial court. The standard condition that appellant engage in drug testing and counseling to facilitate his compliance with the law was also an immaterial deviation from the agreement that did not constitute a punishment significantly greater than contemplated by the bargain. (*People v. Walker, supra*, 54 Cal.3d 1013, 1026-1027; *People v. Lopez, supra*, at p. 637.) We conclude that the sentence did not exceed or contravene the plea agreement.

Accordingly, the judgment is affirmed.

Swager, J.

We concur:

Stein, Acting P. J.

Margulies, J.

